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No. ____

IN THE

Supreme Court of the United States

IN RE GRAND JURY PROCEEDINGS (SIOBHAN REYNOLDS AND PAIN RELIEF NETWORK ALLIANCE, INC.)

On Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

Jeffrey S. Parker
George Mason University
School of Law
3301 Fairfax Drive,
Room 421
Arlington, VA 22201
(703) 993-8055
jparke3@gmu.edu

Robert Corn-Revere
Counsel of Record
Elizabeth J. Soja
Adam Shoemaker
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20006
(202) 973-4200
bobcornrevere@dwt.com

Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. Whether courts must apply strict scrutiny in reviewing grand jury subpoenas that infringe First Amendment rights and whether such scrutiny requires specific findings about the expressive materials being compelled?

2. Whether the presumption of regularity should be applied to grand jury subpoenas that seek expressive materials and information on associations protected by the First Amendment where the litigation history suggests a prosecutorial interest in suppressing speech?

3. Whether the government may meet its burden of proof that it has a compelling interest in requiring the production of expressive materials and that the subpoenaed materials are substantially related to the grand jury investigation entirely through *ex parte*, *in camera* submissions?

4. Whether the First Amendment or Rule 6(e) of the Federal Rules of Criminal Procedure limit the court's authority to seal the entire docket of ancillary grand jury proceedings imposing sanctions for contempt?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioners state that the Pain Relief Network Alliance, Inc. is a nonprofit corporation with no shares held by a publicly traded company.

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OPINIONS BELOW

The opinion of the court of appeals (App. 8 *et seq.*) is not yet reported in any source, official or unofficial, and was issued under seal. The docket in this case is sealed in its entirety, including the opinions and orders of the district court and all pleadings filed by the parties and *amici*.[1]

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 20, 2010. On July 9, 2010, this Court granted an extension of time to file a petition for a writ of certiorari to and including September 17, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The court of appeals' jurisdiction was based on 28 U.S.C. § 1291, as an appeal from a final order of civil contempt.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides that:

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[1] Counsel is aware that the Court strongly disfavors filings under seal. However, because of the sealed dockets below, and out of an abundance of caution, Petitioners file herewith a Motion for Leave to file Petition for Certiorari Under Seal with Redacted Copy for the Public. Petitioners intend to file a Motion to Unseal Petition for Certiorari with this Court as soon as is practicable.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The case also involves Rule 6(e) of the Federal Rules of Criminal Procedure, which is set out in the Appendix to this Petition.

STATEMENT

This case involves the use of grand jury subpoenas that seek [redacted] The grand jury investigation was initiated by a federal prosecutor only after she failed to obtain orders in a related case that would have disrupted Petitioners' associations and imposed a prior restraint on their political advocacy. Efforts to obtain judicial relief from the subpoenas have been cloaked in secrecy, with district and appellate court dockets and decisions under seal. The case raises profound unanswered questions about the level of scrutiny required to review grand jury subpoenas that infringe First Amendment interests, the meaning of the requirement that such investigations must be undertaken in good faith, and

whether judicial proceedings seeking to review such actions may be shrouded from public view.

A. The Petitioners

The Petitioners here are the Pain Relief Network Alliance, Inc. ("PRN"), a New York nonprofit corporation, and its founder and president, Siobhan Reynolds. Reynolds founded PRN in 2002 to advocate for the rights of patients suffering from chronic pain to have access to adequate medical care, including the use of opioid drugs and other lawful controlled substances. Petitioners have been involved in an ongoing public debate over the propriety and wisdom of federal prosecutors' use of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, to prosecute licensed health care practitioners who use lawful prescription medications to treat patients suffering from chronic intractable pain.

PRN provides information and assistance to patients and physicians for whom such drug policies have become a barrier to effective medical treatment. Reynolds' opposition to expanding the "war on drugs" to criminalize chronic pain management has included various forms of public advocacy, such as filmmaking and congressional testimony.[2] In addition, Reynolds

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[2] *See, e.g.*, Testimony of Siobhan Reynolds, President, Pain Relief Network, *Drug Enforcement Administration's Regulation of Medicine*, Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security, House Judiciary Comm., 110th Cong., 1st Sess., July 12, 2007, at 32-38 ("*Reynolds Testimony*").

and PRN have helped doctors obtain access to counsel, expert witnesses, and other resources when prosecuted for pain management practices.

Like many public advocates, Reynolds came to this cause through personal experience. Her late husband suffered for years with chronic illness that produced constant unremitting pain, and he had difficulty in finding a physician who was able to provide adequate relief. When he finally located a doctor who could help treat his condition, that physician was prosecuted under the Controlled Substances Act and removed from practice. *Reynolds Testimony* at 36. Thereafter, Reynolds' husband was unable to obtain adequate substitute treatment, and died in 2006. Reynolds believes that her husband's death was hastened by the federal government's actions blocking his access to adequate pain treatment. *Id.* at 38. She soon learned that her situation was not unique, nor even unusual. *Id.* at 33.

To tell her story and to reach others in similar situations, Reynolds produced a documentary film entitled *The Chilling Effect*, which described her husband's case and that of another patient. That film, which is available for viewing on the Internet,[3] figures prominently in this case, because the grand jury subpoenas now presented for review required

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[3] The film, released in 2005, may be viewed at http://video.google.com/videoplay?docid=-2765050655422810328# (last visited Sept. 15, 2010).

Petitioners to produce [redacted] (App. 83, 91.)

B. The Underlying *Schneider* Prosecution

The events leading to the court of appeals' decision in this case arose from the prosecution of a physician and his wife in the District of Kansas. *United States v. Schneider, et al.*, No. 07-10234-WEB. From its inception, the case received extensive media coverage, beginning with a press release issued by the assistant U.S. attorney. *See* www.justice.gov/usao/ks/press/Dec07/Dec20a.html. Media coverage intensified as groups, including PRN, questioned the prosecution. *E.g.*, Roxana Hegeman, *Kansas: Pain Group Rallies to Doctor's Defense*, Associated Press, Joplin Globe.com, Jan. 3, 2008; Roxana Hegeman, *Patients Sign Petition in Support of Indicted Doctor*, Associated Press, Jan. 9, 2008; Roxana Hegeman, *Doctor, Wife Held Incommunicado From Family*, Associated Press, Jan. 11, 2008; Laura Bauer & Diane Carroll, *Despite Federal Indictment, Doctor Still Has His License*, Kansas City Star, Jan. 27, 2008, at A1; Ron Sylvester, *Pain Relief Network: Prosecutor's Claims Are 'Preposterous,'* Wichita Eagle, Mar. 7, 2008; Tim Carpenter, *Physician Prolific at Writing Drug Rx's*, Topeka Capital-Journal, Mar. 28, 2008, at A1.

Reynolds and PRN assisted the Schneiders by helping them obtain counsel and find expert witnesses for the defense. The assistant U.S. attorney sought to disrupt this assistance by filing a

motion to disqualify the Schneiders' counsel. Motion for Determination of Conflict, *United States v. Schneider, et al.*, No. 07-10234-WEB (Mar. 7, 2008). The government alleged that defense counsel had actual or potential conflicts because PRN may be paying defense counsel and that Reynolds was "orchestrating" defense counsel and was "using the criminal case as a springboard for her own designs." *Id.* at 15-16. Whatever the objective of that motion, the court found no conflict and denied it. Minute Entry, *United States v. Schneider, et al.*, No. 07-10234-WEB (Mar. 14, 2008).

Less than one month later, the government sought extraordinary relief in the form of a gag order. It asserted that Reynolds "has inserted herself into this criminal trial and is serving in several capacities in addition to 'public relations' and 'media consultant.'" Motion Pursuant to Local Rule 83.2.3 [to Ban Extrajudicial Statements], *United States v. Schneider, et al.*, No. 07-10234-WEB (Apr. 4, 2008). The government claimed that the defendants and Reynolds were "working to make it a sensational case, and may be attempting to use the media to influence the jury pool." *Id.* at 2. As a consequence, the government asked the court "to restrain the defendants, their family members, [and] Ms. Reynolds . . . from making extrajudicial statements to the media." *Id.* at 15. It frankly acknowledged it was seeking a prior restraint, but claimed that "[t]his is not a prior restraint on the media, but is a prior restraint on trial participants." *Id.*

The district court failed to see "how the news

coverage will taint the jury pool" and held that the government had failed to show "a compelling governmental interest to restrict speech." (App. 71.) Accordingly, it denied the prosecutor's motion and rejected the proposed gag order as "a 'prior restraint' on speech." (App. 70.)

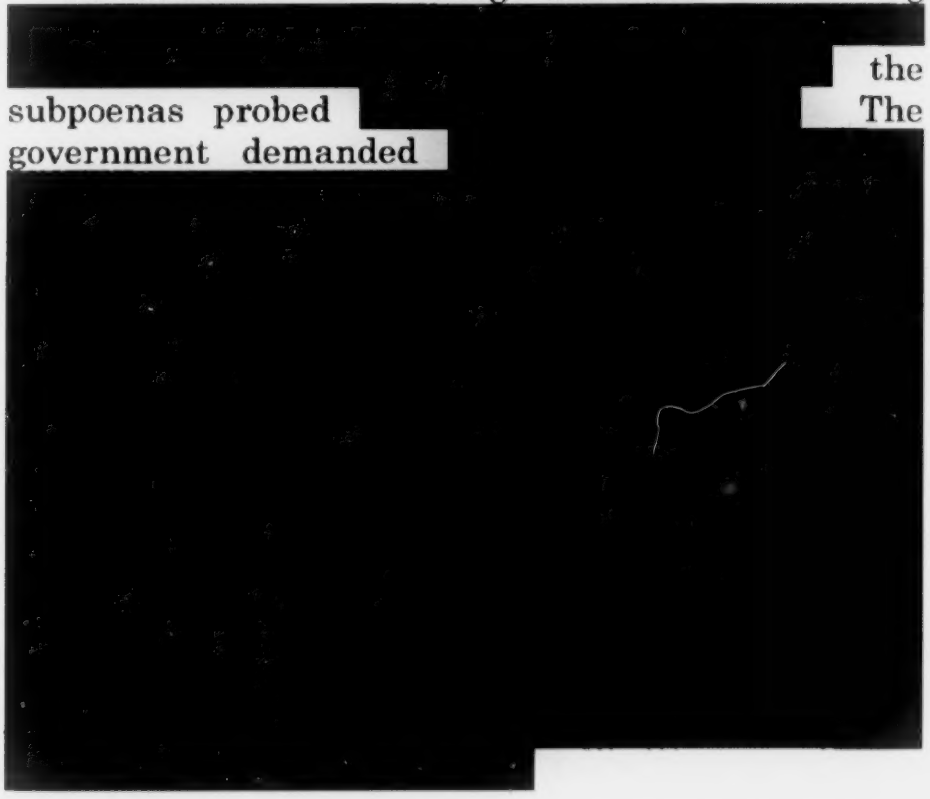
Free to continue its public advocacy, PRN commissioned a roadside billboard in Wichita in early 2009 stating simply, "Dr. Schneider never killed anyone." The billboard also listed PRN's web address, www.painreliefnetwork.org. *See* Harvey A. Silverglate, *Wichita Witch Hunt*, Forbes.com, Sept. 1, 2009. PRN also printed bumper stickers that said "Free the Schneiders."

C. The Grand Jury Subpoenas

Approximately six weeks after PRN's billboard appeared, the same prosecutor convened a separate grand jury investigation [redacted] and issued two subpoenas, one directed to [redacted] and the other to [redacted]. (App. 74, 84.) The subpoenas were served in late March 2009.

Both subpoenas specifically targeted [redacted]

In addition to seeking materials concerning



the subpoenas probed The government demanded

Petitioners moved to quash the subpoenas, but the district court denied the motion after briefing and argument. (App. 68.) Without specifically analyzing the individual document requests, the court concluded that "[a]ll of the documents sought bear a substantial relationship to [the] investigation into [redacted] (App. 67.) It

found no evidence that the investigation was being pursued in bad faith based on its *in camera* review of an *ex parte* statement submitted by the government. (App. 66.)

The district court reaffirmed its decision on reconsideration, finding that [redacted] and finding that the Tenth Circuit does not require [redacted] (App. 67.)

Petitioners continued to resist production and the government moved to compel, seeking a finding of contempt. Petitioners filed a motion to open the contempt hearing to the public, which was granted in part and denied in part. (App. 35.) In a sealed docket, the district court held [redacted] (App. 21.)

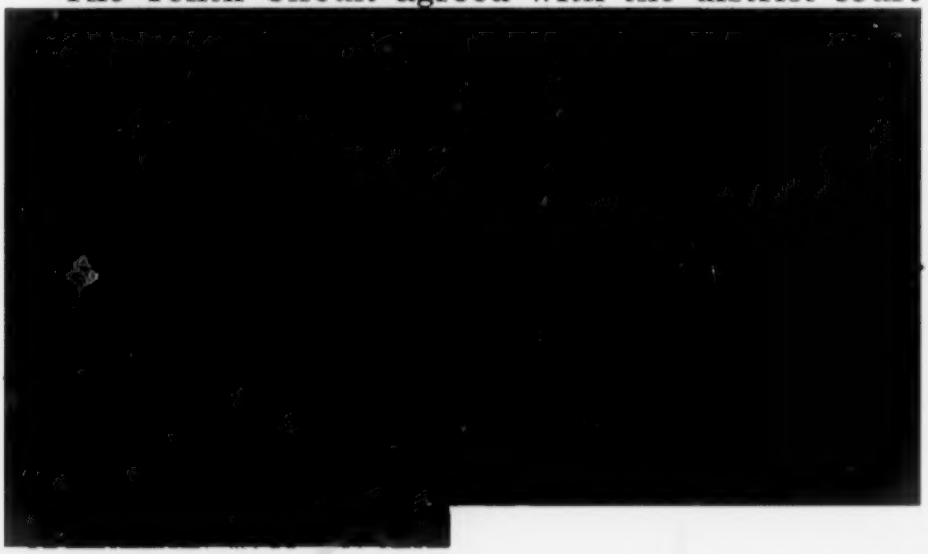
D. The Court of Appeals Decision

Petitioners appealed the contempt findings to the Tenth Circuit, which also conducted its proceedings under seal. (App. 8.) That court agreed that [redacted] The court defined strict scrutiny as requiring the government to show "both a compelling interest to justify the infringement and that the specific documents bear a substantial relationship to that

compelling interest." (*Id.*)

As to the initial showing required to satisfy this level of review, the court held that "a good faith grand jury investigation is a compelling state interest sufficient to generally allow infringement of First Amendment rights." (App. 14.) This means an investigation undertaken in bad faith necessarily would fail this threshold question, but the court did not articulate what proof would be required to show when an inquiry is "simply a tactic" to silence "protected political speech and activities." (App. 15.) Rather, it found

The Tenth Circuit agreed with the district court



The Tenth Circuit found that its review of

[redacted] (*Id.*)

The Tenth Circuit decision and all docket entries remain under seal. [redacted]

During the course of the appeal, Petitioners paid the fines required by the contempt order, ultimately paying $39,400 to the district court. On December 18, 2009, Reynolds informed the district court by letter that she and PRN were insolvent and unable to continue paying the fines. [redacted] (App. 30-31.) Accordingly, on April 1, 2010, Petitioners submitted to the U.S. Attorney [redacted] The court also denied [redacted]

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY THE APPLICABLE STANDARD OF REVIEW AND ITS APPLICATION TO GRAND JURY SUBPOENAS SEEKING EXPRESSIVE MATERIALS

This case presents significant unanswered questions about the level of scrutiny required when the investigatory power of the grand jury conflicts with basic First Amendment protections for political speech. Although grand juries have a broad mandate to investigate possible crimes, this Court has stated that "the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections,'" *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (*quoting United States v. Dionisio*, 410 U.S. 1, 11 (1973)), and that "grand juries must operate within the limits of the First Amendment." *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). Courts must find a way to protect both investigatory interests and in freedom of expression where there is "a clear collision between First Amendment freedoms and the broad powers of a grand jury." *Ealy v. Littlejohn*, 569 F.2d 219, 226 (5th Cir. 1978).

A. This Case Presents a First Amendment Issue of Critical Importance

The subpoenas directed at public policy advocacy by Reynolds and PRN directly implicate essential First Amendment rights. The First Amendment's protection for "freedom of speech, or of the press" was

designed to allow individuals to criticize their government without fear. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991). The liberty to criticize government conduct is "the central meaning of the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

Without a doubt, the government has a legitimate interest in investigating potential crimes, and, as a general matter, the public "has a right to every man's evidence." *Branzburg*, 408 U.S. at 688 (citation omitted). But this Court has stressed that compulsory process must be "carefully circumscribed when the investigative process tends to impinge upon highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). Abuses of the investigative process "may imperceptibly lead to abridgment of protected freedoms." *Watkins v. United States*, 354 U.S. 178, 197 (1957).

The fact that the general scope of an inquiry may be authorized "does not necessarily carry with it the automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 545 (1963). When particular inquiries impinge substantially on First and Fourteenth Amendment associational rights, reviewing courts "must . . . determine the permissibility of the challenged actions." *Id.*

These general constitutional constraints apply fully to grand jury investigations. As this case illustrates, however, the Court has never defined what First Amendment limits must be applied in this context.

B. The Level of Scrutiny Governing Grand Jury Subpoenas Seeking Material Protected by the First Amendment is a Significant Unresolved Issue

This Court has addressed the First Amendment implications of grand jury investigations in various contexts. In *Branzburg*, 408 U.S. at 708, it held that reporters are not privileged to refuse to appear or answer "relevant and material questions" during a "good-faith grand jury investigation." In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Court found that the First Amendment protection for academic freedom does not shield peer review materials from an administrative subpoena. And in *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), the Court held that the test of admissibility at trial did not apply to a subpoena for business records of an adult bookstore, although it declined to rule on the First Amendment issues raised by the demand.

Unfortunately, no Supreme Court decision addresses how the law should be applied when a lower court finds, as the Tenth Circuit did here, that the subpoenaed party [redacted] (App. 13-14.) In *R. Enterprises, Inc.*, 498 U.S. at 303, on which the

court below purported to rely, this Court expressed no view as to what the First Amendment requires the government to show when it subpoenas expressive materials. As a consequence, lower courts have little guidance because "the Supreme Court has yet to define the appropriate standard for reviewing grand jury subpoenas that implicate First Amendment concerns." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, Misc. No. 09-118, 2009 WL 3495997, at *6 (D.D.C. Oct. 26, 2009). *See In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D. Wisc. 2007) ("no Supreme Court precedent yet has required the government to pass a test of substantial relation or compelling need.").

This doctrinal vacuum has spawned confusion among the lower courts. The circuits are divided about whether strict scrutiny applies to grand jury subpoenas for expressive materials—and if it does—how it governs particular demands. Several circuits, including the Tenth Circuit below, have held that such subpoenas must satisfy a two-part test in which the government must show it has a compelling interest in the information and that there is a "substantial relationship" between the subject matter of the investigation and the material to be compelled. *See, e.g., In re Grand Jury Subpoena Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir. 1996); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1233-34 (11th Cir. 1988); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-03 (2d Cir. 1985). The Fourth Circuit, however, has declined to apply greater scrutiny based on the claim that this Court has twice failed to use the substantial

relationship test in cases challenging subpoenas that implicated First Amendment interests.[4] That view of the law has been applied in other cases. *See In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 10 (D.D.C. 1996).

As a consequence, federal prosecutors have continued to argue that strict scrutiny is inapplicable and have misinterpreted this Court's holdings in *University of Pennsylvania v. EEOC*, 493 U.S. 182, and *Branzburg*, 408 U.S. 665, as support for that position. Contrary to this reasoning, however, *University of Pennsylvania v. EEOC* and *Branzburg* fashioned no test, since "neither case found a First Amendment right [that] was implicated by the challenged subpoenas." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 2009 WL 3495997, at *6. Under these circumstances, lower courts have had to find their own way without guidance from this Court.

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[4] *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992). An earlier Fourth Circuit decision strongly endorsed strict scrutiny as the applicable standard in an opinion especially focused on demands for "material presumptively protected by the first amendment." *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1298 (4th Cir. 1987). However, on rehearing, the court confined its holding to whether one of the document demands was impermissibly vague and overbroad, *In re Grand Jury Subpoena: Subpoena Duces Tecum (Four Cases)*, 844 F.2d 202, 203 (4th Cir. 1988) (per curiam), and the Fourth Circuit subsequently abandoned strict scrutiny.

C. This Court Must Resolve a Rift Among the Lower Courts Regarding What Strict Scrutiny Requires Where Subpoenas Seek Materials Protected by the First Amendment

It should come as no surprise in this circumstance that lower courts have been unable to agree on more than just the level of scrutiny that governs challenges to grand jury subpoenas. The circuits are split on the equally important question of what strict scrutiny means in this setting. The court below purported to apply strict scrutiny before upholding the subpoenas, but the absence of Supreme Court authority has resulted in confusion about the nature of such review.

The Tenth Circuit held that strict scrutiny does not require an item-by-item review to determine that the expressive materials sought are substantially related to the grand jury probe. (App. 16.) The court's analysis muddies the already murky waters and conflicts directly with holdings by other circuits that, "[w]hen First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Littlejohn*, 569 F.2d at 228; *Bursey v. United States*, 466 F.2d 1059, 1088 (9th Cir. 1972).

Specifically, the decision below conflicts with the Ninth Circuit's holding that the government "is obliged to show that there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation." *Bursey*, 466 F.2d at 1083. Under this more rigorous approach, a reviewing court "must decide whether the Government has carried its

burden almost question by question before it can compel answers." *Id.* at 1086. The Fifth Circuit likewise has held that reviewing courts must use a particularized analysis that distinguishes between material "connected to the compelling objects of the investigation" and documents that are "none of the grand jury's business." *Littlejohn*, 569 F.2d at 228. *See also id.* at 229 ("We have no doubt that the leaflet circulated by the United League is 'speech' protected by the First Amendment.").

The absence of clear guidance from this Court also has fostered disagreement about whether the constitutional requirement that a grand jury investigation be conducted in good faith is a threshold qualification or a mere factor in determining whether a subpoena demand is sufficiently related to the investigation. Thus, some courts have held that there is no compelling governmental interest at all if subpoenas are based on bad faith. *Id.* at 230 ("This abuse of the grand jury process cannot be tolerated in a free society."). Others have found that "the balance of interests may apply only when the grand jury's inquiry is not conducted in good faith." *See In re Grand Jury 95-1*, 59 F. Supp. 2d at 14. Under this less rigorous view of strict scrutiny, the reviewing court must analyze whether subpoena demands are "substantially related" to the investigation only *after* there has been a showing of bad faith.

The Tenth Circuit below [redacted]

[redacted] This is in significant tension with the observation of the Fifth Circuit and other courts that using investigative authority to chill expression is not a legitimate governmental interest at all. *Littlejohn*, 569 F.2d at 229. Obviously, if the government's purpose is illegitimate, there is no need to determine whether the subpoena's demands are sufficiently related to a potential crime.

In this case, the unexplained and generalized finding that [redacted]

The Tenth Circuit's analysis in this case contrasts sharply with decisions in cases like *Bursey* and *Littlejohn*. In *Littlejohn*, 569 F.2d at 228, for example, the Fifth Circuit found that a pamphlet criticizing a local prosecutor had been the catalyst for a grand jury investigation of an activist group. The court found both that the investigation was being pursued in bad faith "for the purpose of harassing those who, in the exercise of their First Amendment rights, had criticized defendant Littlejohn," and that the government had the burden to justify each inquiry. *Id.* at 230. The court explained that cases of this type "falls squarely within the . . . hypothetical

fact patterns not found present in *Branzburg* and which plainly would have produced a different result." *Id.* at 226.

This Court must address the disagreement among the circuit courts to clarify the applicable law.

II. THIS COURT SHOULD CLARIFY THE EXTENT TO WHICH THE PRESUMPTION OF REGULARITY APPLIES TO GRAND JURY SUBPOENAS THAT SEEK EXPRESSIVE MATERIALS CRITICAL OF GOVERNMENT POLICIES

A. This Court Has Not Opined on What Constitutes a "Bad Faith" Investigation

This Court has emphasized that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." *Branzburg*, 408 U.S. at 707. *See also Reporters Comm. for Freedom of Press v. American. Tel. & Tel. Co.*, 593 F.2d 1030, 1064 (D.C. Cir. 1978) ("[B]ad faith use of these techniques may constitute an abridgment of the First Amendment rights of the citizens at whom they are directed, be they 'journalists' or less exalted citizens."). "It would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression." *Bursey*, 466 F.2d at 1089.

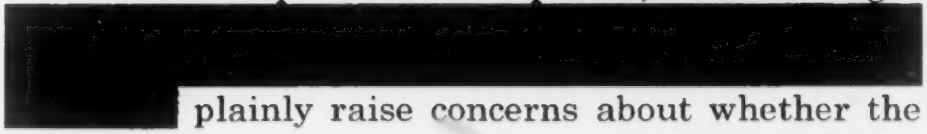
Despite this self-evident principle, the Court has never provided clear guidance for distinguishing between legitimate investigations and politically-motivated witch hunts designed to quell expressive activities. It has made clear that grand juries may not "select targets of investigation out of malice or an intent to harass," *R. Enterprises*, 498 U.S. at 299, yet "[i]t is unclear from the case law precisely what factual showing, if any, [an objecting witness] must make to establish that its freedom of association would be impinged by enforcement of the subpoena." *In re Grand Jury Proceeding*, 842 F.2d at 1235.

The Tenth Circuit decision did nothing to clarify the relevant inquiry. Instead, the decision

The government's bare assurances that an investigation is being conducted in good faith are simply insufficient to address the questions raised by the underlying facts in this case. *See, e.g.*, *Littlejohn*, 569 F.2d at 230.

The circumstances in which the subpoenas were issued raise serious questions about the showing required to overcome the presumption of good faith where the government seeks

The broad scope of the inquiries, which sought



plainly raise concerns about whether the investigation was conducted in good faith. These objective factors, when coupled with the prosecutors'

involvement in [redacted] raise serious questions about the legitimacy of the inquiry, as do the government's prior attempts to use a gag order to silence petitioners. (App. 69.)

"It would be a very sorry day were we to allow a grand jury to delve into the membership, meetings, minutes, organizational structure, funding and political activities of unpopular organizations on the pretext that their members might have some information relevant to a crime." *Littlejohn*, 569 F.2d at 229. This Court's guidance is needed to clarify the showing necessary to establish "bad faith" in this setting.

B. The Government Should Not Be Able to Meet its Burden of Proof With an *Ex Parte, In Camera* Affidavit

The Tenth Circuit's holding is even more troubling in light of its additional finding that the government can meet its burden of proof entirely with an *ex parte* and *in camera* submission. (App. 17.) Where the government's purpose is at issue, it is not enough to rely on "the presumption of regularity accorded grand jury subpoenas," *id.*, bolstered by nothing more than the prosecutor's *ex parte* statement. Not only does this place Petitioners "at a substantial disadvantage" in arguing "whether the demanded documents were substantially related to the grand jury's investigation," *id.*, there is no way to ensure the grand jury process is free from abuse where the government's submissions are both

shielded from the adversary process and the reviewing court is not required to make particularized findings of relevance.

This Court has cautioned that "[o]nce the investigator has only the conscience of government as a guide, the conscience can become 'ravenous.'" *Gibson*, 372 U.S. at 574 (*quoting* Robert Bolt, *A Man for All Seasons* 120 (1960)). Where the objecting witness makes a *prima facie* showing that the investigation impinges on protected speech, *in camera* review of proffered documents alone is not consistent with a strict scrutiny requirement and is insufficient to protect the First Amendment interests at stake.

No doubt, courts have approved the use of *ex parte* and *in camera* review to evaluate whether the documents or testimony at issue would constitute "grand jury material," *In re Grand Jury*, 103 F.3d 1140, 1145 (3d Cir. 1997), or to determine whether a privilege exists. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1151 (D.C. Cir. 2006). But this case presents a different question, because the Tenth Circuit agreed the Petitioners had shown [redacted] more must be required than the government's secret promise of pure motives. *See Littlejohn*, 569 F.2d at 229.

Here, the government's failed attempt to disrupt political associations and to impose a gag order, followed by broadly-drafted subpoenas seeking to compel production of protected materials, should trigger a more searching inquiry. As Justice Stevens wrote in his concurring opinion in *R. Enterprises*, "further inquiry into the possible unreasonable or oppressive character of this subpoena should also take into account the entire history of this grand jury investigation, including the series of subpoenas that have been issued to the same corporations and their affiliates during the past several years." *R. Enterprises*, 498 U.S. at 307 (Stevens, J., concurring) (citation omitted).

This Court must clarify that, where an objecting witness has shown that grand jury subpoenas infringe the First Amendment, the government's burden of proof cannot be met with nothing more than *ex parte, in camera* submissions.

III. THIS COURT SHOULD CLARIFY THE EXTENT TO WHICH THE FIRST AMENDMENT OR RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE LIMIT THE AUTHORITY TO SEAL THE ENTIRE DOCKET

The blanket sealing orders in this case present another question that requires this Court's guidance. The existence of secret dockets before the district court and the court of appeals raises a significant issue, but such sealing is particularly problematic here, where the Petitioners were ordered to pay fines and threatened with imprisonment based on the

prosecutor's *ex parte* submissions. Because a principal issue to be resolved is whether the subpoenas may have been used to suppress dissent, such tight restrictions on public information in the name of grand jury secrecy is a perversion of an institution that was designed "as a kind of buffer or referee between the Government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992).

This Court has recognized exceptions to the general principle of grand jury secrecy where a complaining witness is facing punishment for contempt. *In re Oliver*, 333 U.S. 257 (1948). It noted the historic distrust of secret proceedings such as the Spanish Inquisition and the Court of the Star Chamber that had become "an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial." *Id.* at 269-70. Accordingly, the Court has held that Due Process requires a public tribunal before a person's liberty or property may be forfeited for failure to respond to a grand jury's questioning. *Id.* at 278. *See Levine v. United States*, 362 U.S. 610, 618 (1960).

Such concerns are not limited to questions of Due Process. This Court also has noted the First Amendment implications of excessive grand jury secrecy that can serve "as a device to silence those who know of unlawful conduct or irregularities on the part of public officials." *Butterworth*, 494 U.S. at 635-36. Closed dockets in a case like this subvert the very purpose of grand jury secrecy, which originally served to shield the institution from the Crown. *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. at

575-76. But "the dynamics of modern federal prosecutions are different, with many citizens regarding the grand jury as a weapon of the government rather than a shield from it." *Id.* Clearly delineating the permissible extent of grand jury secrecy in this circumstance is needed to show "that this district's federal prosecutors are part of the solution, not part of the problem" and to "reassure[] the public that someone is watching the watchers." *Id.* at 576.

Despite the fact that "[n]o lesson from history was more indelibly impressed on the draftsmen of the First Amendment than the penchant of governments to stifle criticism by destroying free expression in the name of protecting the internal security of the state," *Bursey*, 466 F.2d at 1084, neither this Court nor the circuits have found a constitutional requirement for public docketing of ancillary grand jury proceedings. *See, e.g.*, *In re Sealed Case*, 199 F.3d 522, 524 (D.C. Cir. 2000); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502 (D.C. Cir. 1998); *In re Newark Morning Ledger Co.*, 260 F.3d 217, 225 (3d Cir. 2001). *But see Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91-96 (2d Cir. 2004) (finding a qualified First Amendment right to docket sheets in other judicial proceedings).

However, allowing courts to conduct grand jury ancillary proceedings in total secrecy, all the way through the appeal, is inconsistent with the general principle that "justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *In re Grand Jury Proceedings*,

776 F.2d at 1103 (*quoting Branzburg*, 408 U.S. at 680-81). This is particularly true to the extent that the possibility of disclosing grand jury material, and thus the need for secrecy, attenuates as proceedings move to the appellate phase. *See In re Motions of Dow Jones & Co.*, 142 F.3d at 502. In such proceedings, appellate courts may preserve grand jury secrecy in various ways, such as by simply reducing the level of detail in discussing the relevant issues. *E.g.*, *Littlejohn*, 569 F.2d at 230.

It also is doubtful that the purposes underlying the historic interest in grand jury secrecy apply with equal force in a case such as this, where the government may be motivated to suppress public awareness of its actions. In other cases where courts have held that ancillary grand jury proceedings can be sealed, the stated purpose has been to uphold such traditional interests as ensuring that persons who are accused but exonerated by the grand jury are not exposed to public ridicule. *E.g.*, *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997) (ancillary proceedings involving government release of memorandum naming uncharged individuals) (*quoting Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979)); *Newark Morning Ledger Co.*, 260 F.3d at 222-23 (ancillary proceedings involving alleged leaks to the media of secret grand jury information by the Justice Department).

This case, however, involves the opposite concern. The Tenth Circuit denied a motion [redacted]

Put another way, the purpose of keeping the entire docket under seal is to *reduce* public discussion of the possible abuse of a grand jury investigation to quell political dissent.

Unlike cases such as *Smith* and *Newark Morning Ledger*, the unindicted targets of the investigation here have a definite interest in making the public aware of their plight, while the government's incentive is to cover it up. In this situation, the broad sealing orders ignore the fact that "information relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment," *Butterworth*, 494 U.S. at 632, and that public access to such information "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. at 270.

Even though circuit courts have not found a First Amendment right of access to ancillary grand jury proceedings in the circumstances before them, some circuit courts have held that the requirements of open proceedings and grand jury secrecy can be harmonized through careful structuring of proceedings pursuant to Rule 6(e)(5). *See In re Motions of Dow Jones & Co.*, 142 F.3d at 502; *In re Newark Morning Ledger Co.*, 260 F.3d at 225. Rule 6(e) contemplates the ability to challenge sealing orders as overbroad for material that "could not properly be classified as grand jury material or as material 'relat[ing] to grand jury proceedings.'"

United States v. McDougal, 559 F.3d 837, 841 (8th Cir. 2009).

In this case, however, sealing the docket and all materials related to the case through its appeal goes far beyond "matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(6). Additionally, circuit courts have found that when information becomes widely known "it has lost its character as Rule 6(e) material." *In re Motions of Dow Jones & Co.*, 142 F.3d at 505 (*quoting Barry v. United States*, 740 F. Supp. 888, 891 (D.D.C. 1990)).

The Tenth Circuit below offered no explanation for how the blanket sealing orders are consistent with the disclosure requirements of Rule 6(e). Although it noted that [redacted] *E.g.*, Harvey A. Silverglate, *Wichita Witch Hunt*, Forbes.com, Sept. 1, 2009; Jacob Sullum, *Drug Control Becomes Speech Control*, Reason.com, Sept. 9, 2009. The court merely said [redacted] *E.g.*, *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1140. Such an opaque conclusion provides no basis for understanding when ancillary proceedings may be kept secret for a grand jury investigation that otherwise is known to the public.

This Court's guidance is needed to determine whether the First Amendment limits the government's ability to conduct contempt proceedings and impose sanctions on totally sealed dockets in the circumstances of this case. Even if no constitutional rule is implicated, the Court nevertheless should clarify the extent to which Rule 6(e) requires courts to make ancillary grand jury proceedings public when "continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." *In re Sealed Case*, 199 F.3d at 526. The answers to those questions will help determine whether the grand jury will continue to serve as a buffer against government excesses or will become a tool of oppression.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

Robert Corn-Revere
(Counsel of Record)
Elizabeth J. Soja
Adam Shoemaker
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20006
(202) 973-4200
bobcornrevere@dwt.com

Counsel for Petitioner

Jeffrey S. Parker
George Mason
University
School of Law
3301 Fairfax Drive,
Room 421
Arlington, VA 22201
(703) 993-8055

September 17, 2010

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REDACTED

Federal Rule of Criminal Procedure 6(e) – Grand Jury Proceedings - Recording and Disclosing the Proceedings

(1) *Recording the Proceedings.*

Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) *Exceptions.*

(A) Disclosure of a grand-jury matter – other than the grand jury's deliberations or any grand juror's vote – may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel – including those of a state or state-subdivision, Indian tribe, or foreign government – that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the

district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against –

• actual or potential attack or other grave hostile acts of a foreign power or its agent;

• sabotage or international terrorism by a foreign power or its agent; or

• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to –

• the national defense or the security of the United States; or

• the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte – as it may be when the government is the petitioner – the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) *Sealed Indictment.*

The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) *Closed Hearing.*

Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records.*

Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent

and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) *Contempt.*

A knowing violation of Rule 6, or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6, may be punished as a contempt of court.

App. 8-68 REDACTED

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,

v.

STEVEN J. SCHNEIDER and LINDA K. SCHNEIDER, a/k/a LINDA ATTERBURY, d/b/a SCHNEDER [sic] MEDICAL CLINIC, Defendant.

No. 07-CR-10234

MEMORANDUM AND ORDER

This case comes before the court on the government's motion pursuant to local rule 83.2.3. (Doc. 57.) The motion has been fully briefed and is ripe for decision. (Docs. 57, 61, 69.) The government's motion is denied for the reasons herein.

The government seeks an order from the court to "restrain the defendants, their family members, Ms. Reynolds (who is essentially a proxy for the defendants and their family members), and potential witnesses, from making extrajudicial statements to the medial . . . [and] that the court order Mr. Williamson to produce to the government and to the court the 'recorded statement' defendant Stephen Schneider provided the press." (Doc. 57 at 15.) Alternatively, the government seeks an intra-district transfer to eliminate potential prejudicial impact on the jury pool. The government also requests that the court prohibit defendants, Ms. Reynolds and Ms. Hatcher from contacting victims and witnesses.

Analysis

Basically, the government seeks an order which would impose a "prior restraint" on speech. "A prior restraint on constitutionally protected expression, even one that is intended to protect a defendant's Sixth Amendment right to trial before an impartial jury, normally carries a heavy presumption against its constitutional validity." *United States v. Salameh*, 992 F.2d 445, 446-47 (2d Cir. 1993).

> In determining whether an order restraining speech is appropriate, the court must evaluate (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication [or speech], one of the most extraordinary remedies known to our jurisprudence.

Koch v. Koch Indus., Inc., 2 F. Supp. 2d 1409, 1412 (D. Kan. 1998) (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)).

First, the government cites the *Koch* case but appears to make no effort to apply the factors to this case. The court is inclined to deny the motion on that

basis. Nevertheless, the court will review whether an order restraining speech is appropriate. In its submissions, the government has attached three news articles and one clip from a television newscast. After reviewing those articles, the court fails to see how the news coverage will taint the jury pool. Next, the government has attached numerous excerpts from phone calls recorded at the jail, most of which are between Linda Schneider and her sister, Ms. Hatcher. In these calls, there are references to getting the media's attention, movie roles, Ophrah [sic] and other fame-seeking actions. Again, the court does not understand, and the government hasn't explained, how these phone calls will affect any potential jurors. The government has not met its burden to show the court that there is a compelling governmental interest to restrict speech. *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07, 102 S. Ct. 2613, 2619-20, 73 L. Ed. 2d 248 (1982)). "The limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224 (1974).

The government's concern of having a biased jury pool can be dealt with by other alternatives. "Less restrictive alternatives to an injunction against speech include such possibilities as a change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors." *Koch*, 2 F. Supp. 2d at 1413. This court will conduct the necessary voir dire with potential jurors

to eliminate any prejudicial impact that the news media may have had.

Alternatively, the government seeks to transfer this case to a different venue within this district. The government is presumably asserting that the pretrial publicity is so prejudicial that it would severely impact the jury pool. Claims of prejudicial pretrial publicity are evaluated in two different contexts.

> The first context occurs where the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community. We "presume prejudice" before trial in those cases, and a venue change is necessary. The second context is where the effect of pretrial publicity manifested at jury selection is so substantial as to taint the entire jury pool.

Goss v. Nelson, 439 F.3d 621, 628 (10th Cir. 2006). Of these two methods for determining whether an impartial jury can be seated, the Tenth Circuit has concluded that voir dire of the venire panel is preferable to the speculation inherent in a finding of presumed prejudice, absent truly extraordinary circumstances. *See United States v. Pedraza*, 27 F.3d 1515, 1525 (10th Cir. 1994) ("Whether a jury harbors prejudice related to pretrial publicity is best determined during voir dire examination"); *Abello-Silva*, 948 F.2d at 1177 ("The proper occasion for determining juror partiality is upon voir dire examination." (Quotation omitted)).

Finally, the government seeks a recorded statement made by Stephen Schneider. Defendants have replied that they do not have any statements in their possession and that it is in the possession of the Associate Press. Therefore, this request is moot.[1]

Conclusion

The parties should not misinterpret this ruling as an endorsement of statements to the media by their counsel or their surrogates. The court firmly believes that cases should be tried in the courtroom, not on the courthouse steps. The court expects counsel to know and follow their ethical responsibilities in this regard. As to those persons who are not bound by any code of ethics, the words of Hubert H. Humphrey come to mind: "The right to be heard does not automatically include the right to be taken seriously."

The government's motion is denied. (Doc. 57).

IT IS SO ORDERED.

Dated this 10th day of July 2008, at Wichita, Kansas.

s/ Monti L. Belot
Monti L. Belot
UNITED STATES DISTRICT JUDGE

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[1] The government also asks this court to remind counsel of their ethical duties under Rule 3.6. The court assumes that all counsel are aware of their duties under the rules. If any counsel has any information regarding an ethics violation, he or she may report that violation to the Kansas Disciplinary Administrator's Office. This court is not a disciplinary review board.

App. 74-91 REDACTED

AMICUS CURIAE BRIEF

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(2)

No. 10-512

Supreme Court, U.S.
FILED
NOV 8 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

IN RE GRAND JURY PROCEEDINGS (SIOBHAN REYNOLDS AND PAIN RELIEF NETWORK ALLIANCE, INC.)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Brief Amicus Curiae of The Reporters Committee for Freedom of the Press In Support Of Petitioners

Lucy Dalglish
Counsel of Record
Gregg P. Leslie
Derek D. Green
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, Va. 22209
(703) 807-2100

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act ("FOIA" or "the Act") litigation since 1970.

SUMMARY OF ARGUMENT

Disagreement exists among lower courts as to the standard of review they should apply to grand jury subpoenas that seek expressive activities and, thereby, infringe the subject's First Amendment rights. Although this Court has not directly addressed the issue, its decisions reflect the recognition that pro-

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties (one of *amicus*' legal fellows who participated the the drafting of this brief, Derek Green, is on a full-time leave of absence from the firm representing Petitioners in this matter, but has had no involvement in the representation of Petitioners); that no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief; that written consent of all parties to the filing of the *amicus* brief has been filed with the Clerk; and that counsel for both parties were given notice of the intent to file this brief more than 10 days before this brief was due to be filed (*amicus* notified the Solicitor General 10 days before the filing deadline, but was required to file earlier when the Solicitor General chose not to file a response; however, an earlier filing by this *amicus* in this case, a Motion to Intervene of Oct. 7, indicated the involvement and intent of the amicus much earlier).

tected expressive activity may be chilled when it is the target of the government's compulsory process or other investigations. The potential for such a chilling effect supports the Court's acceptance of this case and its ruling that a heightened standard of review should be applied to grand jury subpoenas that impinge on constitutionally protected activities. Such a holding is consistent with Supreme Court jurisprudence providing enhanced procedural protections in other First Amendment contexts, including libel and obscenity law.

Although this Court has emphasized that the government may issue a grand jury subpoena only pursuant to a "good faith" investigation, it has not indicated the specific type of conduct that would fall short of this standard. Courts do not opt to examine prosecutorial decision-making often or lightly, and they generally reject attempts to interfere with investigations by federal prosecutors, even when First Amendment rights are implicated. However, in "the rarest of circumstances," courts may find that examination of a prosecutor's "good faith," or lack thereof, is warranted. A number of factors in this case, including an unsuccessful attempt to obtain a prior restraint against the subject before subpoenaing her and an avoidance of the "good faith" determination by reliance on the prosecutor's mere assurances that she conducted the investigation "in good faith," are sufficient to raise concerns about whether the government met its burden. In light of these circumstances, this Court should set a standard for determining when prosecutors act in less than "good faith" in subpoenaing witnesses exercising their First Amendment rights.

Along similar lines, review by this Court also is appropriate in order to curb the inappropriate and unnecessary use of secret dockets in judicial proceedings that are ancillary to grand jury investigations. The sealing of the entire record in the District Court and Court of Appeals is inconsistent with the precedent of other circuits, and is at odds with this Court's established practice of deciding issues of constitutional importance in public.

ARGUMENT

I. This Court should grant review to reconcile conflicts among lower courts as to what standard of review applies to grand jury subpoenas that target expressive activities.

A clearly established, heightened standard of review should apply to grand jury subpoenas that directly burden speech or other activities protected by the First Amendment. The jurisprudence governing the standard to be applied when one's First Amendment rights conflict with the evidentiary needs of prosecutors is widely disparate, presumably because this Court has not weighed in on the issue. *Compare, e.g., In re Grand Jury Proceedings*, 776 F.2d 1099, 1103 (2d Cir. 1985) (utilizing a two-step test requiring the existence of a "compelling" governmental interest and a "substantial relation" between the information sought and the subject of the compelling state interest), *with In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 10 (D.D.C. 1996) (following Fourth Circuit jurisprudence, declining to require the heightened standard of a compelling governmental interest and substantial relationship to the investigation).

Although the authority is fractured, much of the analysis is animated by the knowledge that protected expressive activity is chilled when it becomes the target of the government's compulsory process. *See e.g., In re Grand Jury Proceeding*, 842 F.2d 1229, 1235–36 (11th Cir. 1988) ("The Supreme Court recognized the difficulties of formally proving the evils of chill and harassment, however, and accordingly required only that minor parties show 'a reasonable probability that the compelled disclosure ... will sub-

ject them to threats, harassment, or reprisals from either Government officials or private parties.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976))).

Indeed, the government's use, or misuse, of the grand jury process to silence its critics is alarming and violative of a fundamental First Amendment-based doctrine: The government may not undertake certain actions to combat what it views, for whatever reason, as dangerous speech. *See generally* Eugene Volokh, *Deterring Speech: When is it "McCarthyism"? When is it Proper?*, 93 CAL. L. REV. 1413 (2005). For example, it may not imprison someone for the mere advocacy of racist speech, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), or ban from the electoral process political parties that want to run on unpopular views. *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974). The same should be true of the grand jury process. The government should not be able to frighten citizens into refraining from exercising their First Amendment rights of expression, advocacy and association by threatening them with compulsory process — at least not without first satisfying a heightened standard of scrutiny. To do otherwise would allow a content-based regulation on speech to survive without withstanding the proper constitutional test, a notion that directly contravenes this Court's well-established First Amendment jurisprudence regarding content-based regulations. *See, e.g., Ark. Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 649 (1983))).

In addition to guaranteeing the right of free speech, the First Amendment provides protection from government interference with those activities that assure self-governance, including "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues." Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961). Certainly, that protection must extend to public discourse about and advocacy against government prosecutions. After all, as a dissent in this Court recently noted, "[t]hat ... speech and association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection is elementary." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2732 (2010) (Breyer, J., dissenting) (emphasis in original).

Moreover, this Court has provided enhanced procedural protections in other First Amendment contexts, notably libel, as prophylactic rules to diminish self-censorship and other risks associated with chilling effects. *See* Amy Pomerantz Nickerson, Comment, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard*, 57 UCLA L. Rev. 841, 876 (2010). Perhaps the strongest example is the Court's recognition in one of its landmark opinions that free expression must have "breathing space" to survive and, as such, the inevitable "erroneous statement ... in free debate ... must be protected." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964). The *Sullivan* Court also announced that libel plaintiffs must prove actual malice by convincing clarity, rather than the more relaxed preponderance of the evidence standard and required the Supreme Court to make an independent exami-

nation of the whole record before the trial and appellate courts "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 285. In imposing the burden of proving the falsity of the allegedly defamatory statement on the plaintiff, as opposed to the defendant having to prove the truth of what he or she wrote, the Court noted that under the latter standard, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* at 279.

The Court also has afforded extra procedural protection to allegedly obscene material, noting that the Fourth Amendment's requirement of probable cause may be inadequate when the search or seizure targets expressive material. *See Marcus v. Search Warrants*, 367 U.S. 717, 731 (1961) (requiring the judge, before issuing a warrant for its seizure, to determine whether particular material is obscene, since "the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications"). *See also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with scrupulous exactitude.") (citation and internal quotation marks omitted).

Thus, adoption of a heightened standard of review for grand jury subpoenas that implicate protected

First Amendment activities finds support in public policy, as well as this Court's jurisprudence. As such, the Court should hear this case to clearly define what that standard requires.

II. This Court should grant review to provide guidance as to what type of investigation qualifies as one conducted "in good faith."

A grand jury subpoena with indicia that it was issued in an attempt to quell protected speech cannot qualify as one conducted "in good faith," and, in those cases, the government must provide additional information about its motives.

Although this Court has declined to grant journalists a First Amendment-based privilege not to testify before grand juries, it has recognized that "news gathering is not without its First Amendment protections." *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). As the Court explained:

> [G]rand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. . . . We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

Id. at 707–08. Justice Powell, who cast the necessary fifth vote to support the judgment, noted in his concurrence that the Court did not hold that the government is free to annex the media as an investigative arm and elaborated on the majority's warning that harassment would not be tolerated. He wrote:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation ... he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id. at 710 (Powell, J., concurring). Because the Court emphasized that "the obligation of reporters to respond to grand jury subpoenas [is the same] as other citizens," *id.* at 682, one can logically conclude the converse — that the "good faith" requirement is no less applicable to citizens exercising their First Amendment rights than it is to journalists.

Since *Branzburg*, however, this Court has not fully fleshed out what constitutes a "good faith" investigation or, perhaps more significantly, what action qualifies as less than "good faith."[2] In light of the fact that this language seems to provide the only First Amendment protection in the grand jury setting, a

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[2] Although courts loosely use the terms "good faith" and "bad faith" when describing the grand jury subpoena standard, *e.g.*, *Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1075 (D.C. Cir. 1978), the terms are not interchangeable. That is, nothing in *Branzburg* indicates that a prosecutor must act "in bad faith." Rather, *Branzburg* requires only that an investigation be conducted "in good faith." The distinction is significant, as lack of "good faith" is a significantly more relaxed standard than "bad faith."

clear standard governing the types of conduct or activities that could qualify as each is needed.

Courts do not lightly choose to interfere with prosecutorial discretion in this area, but in exceptional circumstances they must examine the "good faith" of the government. Indeed, courts have generally rejected attempts to interfere with investigations by federal prosecutors, even when First Amendment interests are implicated. *See Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978) (denying two newspapers' request for injunctive and declaratory relief from a telephone company policy of providing toll-call records to law enforcement officials, holding that the First Amendment provided no additional shield respecting privacy interests beyond the Fourth Amendment's protection in the context of a good faith criminal investigation); *LaRouche v. Webster*, 566 F.Supp. 415 (S.D.N.Y. 1983) (denying declaratory and injunctive relief from a U.S. attorney's investigation into a congressman's campaign after a series of newspaper stories indicated potentially illegal campaign-financing activities). Noting that "[t]he decision to investigate, like the decision to prosecute, is one which the Constitution places in the executive branch," the *Webster* court held that the constitutional separation of powers prevents courts from interfering with the exercise of prosecutorial discretion "except under the rarest of circumstances." *Id.* at 417. *See also In re Grand Jury of S. Dist. of Ala.*, 508 F. Supp. 1210, 1213 (S.D. Ala. 1980) ("the petitioners have failed to carry the heavy burden necessary to warrant the type of *extreme interference* with the grand jury process") (emphasis added).

Amicus submits that this case is a good example of those rare circumstances justifying court examination of prosecutorial discretion. From the limited amount of information available from recently unsealed but still heavily redacted pleadings and popular-press coverage of the issue, a strong case can be made that the government tried to silence Siobhan Reynolds' speech, not because it suspected her of any criminal wrongdoing but because the prosecution found her troublesome to its case. (Pet'rs' Pet. 5–6.) In trying to convince the trial court that a presumptively unconstitutional prior restraint was warranted in the criminal prosecution to which she was not a party, the prosecution said that "Siobhan Reynolds [was] contacting victims and witnesses in an effort to influence, harass, and/or intimidate them." Government's Motion Pursuant to Local Rule 83.2.3 at 8, *United States v. Schneider*, No. 07-10234-MLB (D. Kan. Apr. 4, 2008). Its only support for such a claim, however, was a newspaper article stating that one of the defendants' former patients "began working with" Reynolds, who traveled to Wichita to "generate public sympathy for the incarcerated doctor and his wife." *Id.*

When it was unable to stifle her activities through a prior restraint, the government, in the exercise of its prosecutorial discretion, issued a sprawling grand jury subpoena that had nearly 100 subparts and "sought documents, e-mails, phone records, checks, bank records, credit card receipts, photographs, videos and 'Facebook communications (including messages and wall posts)' concerning contacts with dozens of people, including doctors and lawyers, along with information about a billboard supporting the [defendants] and a documentary film

called ... 'The Chilling Effect.'" Adam Liptak, Column, *Outspoken Activist's Case Becomes Tangled in Secrets*, N.Y. TIMES, Nov. 2, 2010, at A22, *available at* 2010 WLNR 21880557 (quoting the subpoena). These facts suggest that the government may have been punishing Reynolds for her speech, and should be sufficient to indicate a lack of good faith. As such, *amicus* asks this Court to review the case and reexamine the "good faith" nature of the investigation in a more public format.

The lower courts would be well-served by specific guidance from this Court as to what constitutes a "good faith" investigation. The Eleventh Circuit has pointed out that "[i]t is unclear from the case law precisely what factual showing, if any, [an objecting subpoenaed witness] must make to establish that its freedom of association would be impinged by enforcement of the subpoena." *In re Grand Jury Proceeding*, 842 F.2d at 1235. As stated above, many of the facts underlying this case suggest an intentional infringement on First Amendment rights. That is, the presence of several of the following factors would seem to signal a grand jury investigation not being conducted "in good faith":

- The absence of any law-violation allegations against the subject, whose sole role in the underlying prosecution is one of advocacy;
- Unsuccessful attempts to obtain a prior restraint against the subject;
- A subpoena calling for production of irrelevant material and an unduly burdensome demand for production of documents;

- A subpoena insufficiently specific with respect to the materials to be disclosed;
- Avoidance of the question of "good faith" by allowing the prosecutor to simply attest to such with no further showing;
- An across-the-board sealing of both the trial- and appellate-court dockets.

When an objection from a witness that a subpoena impinges on his or her First Amendment rights is accompanied by any of the above factors, mere assurances from the government that it issued its subpoena "in good faith" cannot survive constitutional muster or a heightened standard of review that should apply to subpoenas seeking expressive materials. At the very least, the witness must be able to question the government about its suspicious motives in an adversarial process overseen by a court that is required to make particularized findings on the record. After all, as this Court noted almost 50 years ago:

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of ... abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960).

This Court should grant review to definitively establish — for both reporters facing grand jury sub-

poenas, as well as other citizens at whom they are directed — what an investigation conducted "in good faith" entails. Otherwise, Justice Powell's reminder that "the newsman ... [who] believes that the grand jury investigation is not being conducted in good faith ... is not without remedy," is simply meaningless. For, as the disclosed facts in this case suggest, a standard-less definition of "good faith" will allow governmental attempts to silence its critics by stifling their protected activities. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

III. This Court should grant review to resolve the conflicting interpretation and practice by this Court and the various courts of appeals regarding their authority to seal entire case files in matters that are ancillary to grand jury proceedings.

The decision of the U.S. Court of Appeals for the Tenth Circuit to seal the entire case file in this matter presents a stark example of the unresolved tensions that remain between the public's right of access to the courts and a court's interest in maintaining secrecy of grand jury proceedings. This Court should grant the petition in order to correct the Tenth Circuit's apparent[3] misapplication of the authority to order the complete sealing of a record in which the

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[3] Because the Tenth Circuit's opinion remains sealed, with no publicly available order explaining the justification for secrecy, *see* Pet'rs' Pet. at 1 n.1, *amicus* is left to presume the reasons for the Tenth Circuit's decision to seal the entire case file.

facts are already publicly known and the traditional grounds for secrecy carry no force.

A. The complete sealing of the record below conflicts with the precedent of other circuit courts of appeals.

By completely sealing the record of the ancillary grand jury proceedings here, the Tenth Circuit has interpreted the need for grand jury secrecy, whether based on Federal Rule of Criminal Procedure 6(e) or some other authority, in a manner that is not consistent with other circuit courts of appeals. This Court should grant the petition in order to correct the disparate practices of federal courts in the various circuits regarding the propriety of sealing hearings and court records in ancillary grand jury proceedings.

The lower courts' sealing of the entire record in this matter cannot be reconciled with the approach taken by a number of other courts of appeals that have expressly held that, at a minimum, portions of civil contempt proceedings for non-compliance with a grand jury subpoena must be public. *See, e.g., In re Grand Jury Subpoena*, 97 F.3d 1090, 1095 (8th Cir. 1996); *In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3d Cir. 1990); *In re Grand Jury Proceedings Involving Eve Rosahn*, 671 F.2d 690 (2d Cir. 1982). In *Rosahn*, for example, the Second Circuit relied on this Court's reasoning in *Levine v. United* States, 362 U.S. 610 (1960), to hold that non-public civil contempt proceedings, which carry the same possibility of imprisonment as criminal contempt proceedings, implicate the same Due Process concerns as non-public criminal contempt proceedings:

> Given the burden that imprisonment imposes on an individual, a civil contempt trial that could result in an order of confinement carries with it the same concerns and purposes that lead to the requirement of a public trial in the criminal context, such as the need to assure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system. Although a contempt trial may properly be closed to the public when substantive grand jury matters are being considered, no reason is advanced for preventing a defendant from having the rest of his trial in public.

Rosahn, 671 F.2d at 697 (citation omitted). Those same concerns — accountability in the exercise of judicial and governmental power, preservation of the appearance of fairness, and public confidence in the judicial system — are undoubtedly also present when a court not only threatens to imprison[4] a grand jury witness but also seals all records in the matter.

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[4] *See* Petition at 24 (". . . Petitioners were ordered to pay fines and threatened with imprisonment . . ."). The press has also reported that Reynolds faced "imminent jailing for contempt." Roxana Hegeman, Associated Press, *Pain-relief advocate target of secret federal probe*, Wichita Eagle (online posting date Aug. 22, 2010), *available at* http://www.kansas.com/2010/08/22/1456739/schneider-advocate-targeted-in.html (last accessed Nov. 4, 2010).

The sealing of the entire record by both the U.S. District Court and the Tenth Circuit is also irreconcilable with the approach taken by the U.S. Court of Appeals for the District of Columbia in proceedings arising out of the investigation into the disclosure of Valerie Plame's identity. Unlike the approach of the District Court and the Tenth Circuit in the present matter, the D.C. Circuit publicly affirmed the District Court's findings of contempt and refusal to quash grand jury subpoenas that were issued to reporters in that matter. *In re Grand Jury Subpoena, Judith Miller*, 397 F. 3d 964 (D.C. Cir. 2005), *as modified and reissued*, 438 F.3d 1141 (D.C. Cir. 2006). Combined, the published opinions by the District Court and the Court of Appeals in the *Miller* matter explain in general terms the purpose of the underlying grand jury investigation, *see* 438 F.3d at 1143-44, the information sought by the prosecutor (including the specific subject of the testimony and documents sought), *id.*, and the legal analysis of the courts.

Unlike the Tenth Circuit's action in this case, the D.C. Circuit approved the sealing and *ex parte* submission of certain records in relation to the ancillary proceedings (and a portion of a concurring opinion was redacted), but published its analysis in a reported opinion. In fact, the D.C. Circuit issued an additional opinion explaining its reasoning for subsequently unsealing additional portions of record. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) (per curiam) (citing circuit precedent for "the common-sense proposition that secrecy is no longer 'necessary' when the contents of grand jury matters have become public").

If anything, the argument for grand jury secrecy in the *Miller* matter was much stronger than in the present case. *Miller* involved the reputations and potential criminal culpability of Bush Administration officials over the possible leaking of classified information. *See* 438 F.3d at 1142-43. The political and national security ramifications at issue in that investigation are simply not present in this case. Yet the D.C. Circuit still managed to discuss most of the contempt issues — the issues arising from proceedings ancillary to the grand jury investigation itself — publicly.

Even some circuits that have taken more restrictive views of disclosure under Federal Rule of Criminal Procedure 6(e) have recognized that the Rule does not support the complete sealing of ancillary matters. The Third Circuit, for example, has held that it is permissible to seal ancillary contempt proceedings at an *initial* stage, but not for the full adjudication. In *In re Newark Morning Ledger Co.*, 260 F.3d 217 (3d Cir. 2001), the Third Circuit affirmed the U.S. District Court's sealing of "initial filings and motions" in an ancillary proceeding based on the lower court's holding that, after reviewing the material, it would subsequently "open the proceedings and disclose all non-grand jury material." *Id.* at 227-28. Citing prior circuit precedent, the Third Circuit approved this approach, noting that the district court "should complete its review of the proceedings and after determining what, if any, materials contain secret grand jury information, unseal all non-secret material." *Id.* at 228 n.18.

Here, even the court's *legal reasoning* — and, indeed, the dockets themselves, *see* Pet'rs' Pet. at 1 n.1

— remains off-limits to the public. This approach is inconsistent with the Tenth Circuit's own precedent. In *In re Special Grand Jury 89-2*, 450 F.3d 1159 (10th Cir. 2006), the Tenth Circuit held that "legal files" are protected by Criminal Procedure Rule 6(e) secrecy "to the extent" that those filings "disclose grand jury proceedings." *Id.* at 1176. Notably, however, the Tenth Circuit recognized that the court's legal analysis and record of proceedings were *not* — and should not be — secret:

> Of course, purely legal argument, without reference to what occurred before the grand jury, *needs no protection*. But the district court's public orders, as well as this opinion, adequately disclose those matters. Perhaps more can properly be disclosed, but that can be better determined during the proceedings on remand, which we order.

Id. (emphasis added). By sealing the entire record, the Tenth Circuit has foreclosed the public review of even "purely legal argument." The Tenth Circuit's opinion in *In re Special Grand Jury* reflects that the court's decision here is in conflict with not only the practice of other courts, but also the Tenth Circuit itself.

B. The lower courts' sealing of the entire court file is at odds with this Court's established practice of deciding issues of constitutional importance in public.

This Court has a long history of publicly deciding important issues of constitutional and procedural significance that arise out of proceedings ancillary to

grand jury investigations. The approach taken by this Court in such cases serves as a roadmap for how appellate courts *should* publicly address the legal issues while still protecting grand jury secrecy. A review of a few of these cases demonstrates how far astray the Tenth Circuit's approach was here.

This Court's opinion in *Branzburg v. Hayes*, *supra*, provides a primary example. Like the present case — and like the *Miller* case in the D.C. Circuit, *supra* — the consolidated matters reviewed in *Branzburg* all involved witness challenges on First Amendment grounds to grand jury subpoenas. But unlike the Tenth Circuit's approach, this Court publicly announced its holding in *Branzburg*. The Court's opinion summarized the underlying grand jury investigations, the challenged subpoenas, and the procedural histories of the cases at issue, *see* 408 U.S. at 667-679, using this factual context as a background for explaining the Court's reasoning on an important issue of constitutional law. *See, e.g.*, *id.* at 689-91; *see also id.* at 708-09 ("Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.") The opinion contains no suggestion that such a discussion somehow violated grand jury secrecy.

This Court took a similar approach later that same year in *United States v. Dionisio*, 410 U.S. 1 (1972), holding that neither the Fourth nor Fifth Amendment provided grounds for a witness to oppose a grand jury subpoena that sought a voice exemplar from the witness. The Seventh Circuit had held — also in a published opinion — that a witness had a

Fourth Amendment right not to provide the voice exemplar to a grand jury. *In re Dionisio*, 442 F.2d 276 (7th Cir. 1971) (per curiam). This Court's opinion discussed in detail the underlying grand jury investigation and the procedural history of the case. The opinion described why the grand jury was convened ("to investigate possible violations of federal criminal statutes related to gambling"), specific evidence that the grand jury had received ("certain voice recordings that had been obtained pursuant to court orders"), and the evidence at issue in the court challenge ("voice exemplars for comparison with the recorded conversations that had been received in evidence"). *See* 410 U.S. at 2-4. It also discussed how Dionisio and other witnesses challenged the subpoena, and the lower court rulings with respect to Dionisio. *See* 410 U.S. at 3-4, 13. Again, there was no indication that the Court's opinion somehow violated grand jury secrecy.

This Court's opinion in *United States v. R. Enterprises, Inc.*, which concerned an attempt by three businesses to avoid complying with a grand jury subpoena, follows the same pattern. 498 U.S. 292, 294 (1991). The Court identifies the businesses and subpoenas at issue, describes the underlying grand jury investigation, and summarizes the proceedings below. *Id.* at 294-98. Although the Court's opinion noted the "strict secrecy requirements" of grand jury proceedings required by Federal Rule of Criminal Procedure 6, the Court did not suggest that an appellate court's legal analysis of the ancillary proceedings should be sealed. *Id.* at 299.

Branzburg, *Dionisio*, and *R. Enterprises* are just a few of cases in which this Court has publicly decid-

ed issues of constitutional and procedural importance arising out of judicial proceedings ancillary to grand jury investigations.[5] This approach reflects the premise that grand jury secrecy is not absolute, and does not justify extraordinary measures that infringe on other deeply-held values. *See, e.g., Levine*, 362 U.S. at 618-19 (concluding that grand jury secrecy did not support shutting out the public from criminal contempt adjudication).

The Tenth Circuit should have, but did not, approach the present case in the same manner. As the Court explained in *Levine,* there is "no further cause for enforcing secrecy" with respect to those parts of the ancillary court proceedings that do not necessarily disclose actual grand jury deliberations or secrets. *Id.* at 618. The total secrecy mandated by the Tenth Circuit in the present case is at odds with this Court's long history, and reflects an apparent misinterpretation of grand jury secrecy that must be addressed.

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[5] *See also, e.g., In re Oliver*, 333 U.S. 257 (1948); *Levine v. United States*, 362 U.S. 610 (1960), *United States v. Calandra*, 414 U. S. 338 (1974), *United States v. Doe*, 465 U.S. 605 (1984).

CONCLUSION

This Court should grant review in this case in order to clarify the standard of review when a grand jury investigation implicates the First Amendment rights of a witness. In particular, the Court must clarify when the conduct of an investigation may be seen as in less than good faith, to fully realize the protections under the First Amendment that the Court first noted in *Branzburg v. Hayes*, *supra*.

In addition, the Court should find that the complete sealing of matters ancillary to a grand jury proceeding is improper when there is no demonstrated need for secrecy, and when a less restrictive alternative, such as redacted filings, is available.

Amicus asks this Court to accept review, so that it can give guidance to appellate courts about when dockets and records should be presumptively open, with any particular redaction and sealing done subsequent only to a demonstrated, narrowly tailored need for confidentiality.

Respectfully submitted,

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
Derek D. Green
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Ste. 1100
Arlington, VA 22209-2211
(703) 807-2100

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